# Why an Employer Should Visit a Retirement Plan Dentist to avoid a Plan Root Canal

## By Ary Rosenbaum, Esq.

More than a dozen years ago, there was a medical report that dental plaque could cause heart disease. I thought it was some sort of dental conspiracy to increase revenue as fluoridated water and other dental hygiene has had to have a negative effect on the dentists' bottom line. Regardless of my cynicism, good oral health is important. While some people only see a dentist when something in their mouth hurts them, many visit the dentist for annual or semi-annual checkups as preventative care, to avoid dental problems later. Brushing, flossing, and checkups help avoid the root canals, caps, and dentures. As an ERISA attorney, sometimes I see myself as a retirement plan dentist. While some plan sponsors only seek counsel from an ERISA attorney when something terribly goes wrong with their retirement plan, there are many plan sponsors these days that seek ERISA counsel as a form of preventative care for their retirement plans. Seeking counsel from an ERISA attorney can be like seeking a dentist in avoiding greater harm. So this article is why retirement plan sponsors should see the help of a Retirement Plan Dentist before having a retirement plan root canal.

**Plan sponsors should be pro-active**

Being a retirement plan sponsors takes on a whole lot of potential liability. As a plan sponsor, the employer takes on the additional role of being a plan fiduciary. A plan fiduciary takes on a lot of responsibility because a fiduciary requires the highest duty in law and equity because a plan sponsor is responsible for the retirement assets of the plan participants. The problem with plan sponsors is that a good chunk of the time, they neglect their duties as a plan fiduciary until something goes wrong, Plan sponsors are reactive, they spring into action to cure plan problems when they should be pro-active, nipping things in the bud before they become bigger problems. When it comes to plan problems, there is a snowball effect where small problems mushroom into larger problems because the plan sponsor did nothing. Not only can a plan sponsor nips problems in the bud by being pro-active, many of the penalties that the Internal Revenue Service (IRS) or the Department of Labor (DOL) are eliminated or heavily discounted if the plan sponsor cures these issues voluntarily rather than being caught on audit. For example, a plan sponsor that discovers they failed to file a Form 5500 (or several 5500s) on time can save potential penalties of tens of thousands of dollars by using their Delinquent Filer Voluntary Compliance Program. A retirement plan sponsor who is pro-active is like the dental patient who is a pro-active; taking preventative steps can avoid more pain later.

**The threats of harm are real**

Some critics of my writings claim that small to medium sized employers rarely get sued for breaches of fiduciary duty, so I am in the market of selling useless legal services. I guess that is my version of the plaque causing heart disease theory. While the chances of a small to medium size employer getting sued are slim, the threat is still there. The chance of getting hit by lightning is remote; we still minimize the risk of getting hit by avoiding standing near trees or staying outside. In addition, ERISA litigation progresses and when ERISA attorneys run out of suing the larger plans for fiduciary duty breaches, where will they turn next? Regardless of the small risk or not, plan sponsors should follow good practices because good practices tend to avoid bad results. In addition, poorly run small retirement plans have other things to fear such as an audit by the IRS and the DOL or just the threat of litigation by a terminated employee who just wants a couple of shekels after termination of employment. A plan sponsors shouldn't take the risk that my concerns about them are unwarranted especially when retirement plan compliance reviews are far less than penalties on plan audits. The days when plan sponsors could simply neglect their retirement plans are over. The threat of litigation has increased; the need to comply with regulations such as the fee disclosure regulations has increased. Don't make a government auditor or ERISA litigator's day, a plan sponsors should have their plan reviewed by an ERISA attorney or independent retirement plan consultant.

**Review Plan Terms**

Too many times, a plan document will say one thing and the plan is administered a different way. A retirement plan must be administered according to the terms of its plan document as long as the plan document conforms to the Internal Revenue

Code and ERISA. Failure to operate the plan according to its terms is a breach of fiduciary duty and risks the plan to penalties from the IRS with plan disqualification as the ultimate penalty. A good review by the Retirement Plan Dentist can go a long way in nipping potential plan document problems quickly.

**Review Plan Type and Contributions**

A plan sponsor should review whether the retirement plan still currently fits their needs and whether the plan's method of allocation should be increased or decreased, based on their economic condition. There are too many plan sponsors with defined benefit plans that they can no longer afford or a small plan that restricts how much money they can put away for their top employees. In addition, if a plan could no longer afford safe harbor or other mandatory contributions, a review whether those contributions can be suspended or eliminated should be discussed. In addition, if a 401(k) plan sponsor can afford safe harbor contributions to avoid discrimination testing; this is something that should be reviewed. If a plan sponsor is flush with profits, the third party administrator (TPA) should be contacted on whether another form of contribution allocation or an additional plan should be implemented to maximize contributions to highly compensated employees. Plan design is like a car's fuel efficiency, a plan sponsor should maximize it to save on taxes and increase retirement savings.

**Review Plan Administration**

The administration of a retirement plan is highly technical which requires precise recordkeeping and mathematical discrimination testing. Retirement plans need recordkeeping and administration to preserve qualification as a tax-exempt entity. So errors in recordkeeping and administration threaten a plan's qualification and expose the plan sponsor to potential liability from the Internal Revenue Service, Department of Labor, and plan participants. A review of the TPA's work by an independent party can root out errors that typically are only discovered years later when there is a change of TPAs. I once had a client who was treated by their TPA as a safe harbor 401(k) plan, even though they were not. Therefore, required discrimination tests for non-safe harbor 401(k) plans weren't completed for a number of years. This serious error by the TPA was only discovered during the conversion process to a new TPA when I asked for discrimination tests that did not exist. Without the change to a new TPA, I can only imagine how many more years this would have continued that the plan wasn't being administered correctly.

**Review the Fiduciary Process**

When it comes to retirement plans, there are too many retirement plans without financial advisors to assist them. In addition, there are too many retirement plans with financial advisors who don't assist them. Too many plan sponsors think that the role of a financial advisor is to pick out investment options, no more and no less. So plan sponsors do it themselves or don't expect their financial advisor to do more than investment picking, so many of these advisors get a fee without doing the bulk of the work. The role of a financial advisor is to help a plan sponsor manage the fiduciary process. That entails the development of an investment policy statement (IPS), implementation, and review of plan investment options based on the IPS, as well as giving education to plan participants if participants are directing their own investments under the Plan. I did a Retirement Plan Tune-Up (my legal review for $750,cheap plug here) for a medical practice that had a broker netting 60 basis points (.60% of plan assets) on a $14 million 401(k) plan, which was high. The plan document and administration was in order since it was a safe harbor plan. However, the Plan had no IPS and no education given to plan participants. In addition, the Plan offered 53 different mutual funds for investment. While offering 53 investment options isn't illegal, it does have the effect of lowering the deferral rate of plan participants because studies have shown that large fund lineups do overwhelm and confuse plan participants.

**Plan costs**

A plan sponsor as a fiduciary has the fiduciary duty in only paying reasonable expenses and this was often difficult in a retirement plan industry that wasn't known for its fee transparency. While the Department of Labor has implemented fee disclosure regulations that require plan providers such as a TPA to divulge expenses that are directly and indirectly charged, that is irrelevant if a plan sponsor doesn't take the disclosure and shop the plan around to determine whether the fees being paid are reasonable or not. Nothing requires a plan sponsor to pick the cheapest plan providers just that they pay reasonable plan expenses based on the services they get. So the only way to do that is to shop the plan around to other providers. If a plan sponsor doesn't know if there fees are reasonable or not, they bear the risk that the fees are unreasonable and subject the plan to fiduciary liability.




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